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No. 04-727

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

COVAD COMMUNICATIONS COMPANY AND
DIECA COMMUNICATIONS, INC. D/B/A
COVAD COMMUNICATIONS COMPANY,
Petitioners,

v.

BELLSOUTH CORPORATION AND
BELLSOUTH TELECOMMUNICATIONS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY OF PETITIONERS

Of Counsel:
TONY G. POWERS
KIMBERLY L. MYERS
ROGERS & HARDIN LLP
2700 International Tower
229 Peachtree Street, NE
Atlanta, GA 30303
(404) 522-4700

JAMES A. KIRKLAND
MARGARET A. ROBBINS
COVAD COMMUNICATIONS COMPANY
110 Rio Robles
Santa Jose, CA 95134
(408) 952-6486

BRUCE D. SOKLER
Counsel of Record
MICHAEL H. PRYOR
FERNANDO R. LAGUARDA
ROBERT G. KIDWELL
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
701 Pennsylvania Ave., NW
9th Floor
Washington, DC 20004
(202) 434-7300

Counsel for Petitioners

February 10, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners state as follows: Neither Covad Communications Company nor DIECA Communications, Inc., is a publicly-held company. Both are wholly owned by Covad Communications Group, Inc., which is a publicly-held company. No person or entity holds 10% or more of the stock of Covad Communications Group, Inc.

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REPLY OF PETITIONERS

BellSouth does not deny that this Court should be concerned when the district courts are stripped of jurisdiction and parties are left without a remedy contrary to the express intent of Congress. Instead, BellSouth muddles the procedural history of this case, seeking to leave the mistaken impression that Covad has waived its claims of error. Covad has already explained how the Eleventh Circuit's decision is at odds with other circuits. A review of the history of this case is sufficient to demonstrate why Covad has not waived any of its claims.

BellSouth asserts that "[b]efore the court of appeals, Covad effectively conceded that its breach of contract claim

was properly dismissed by the district court." BellSouth Opp. at 7 (January 31, 2005). Covad conceded no such point, either expressly or "effectively." BellSouth's "waiver argument" is nothing more than sleight-of-hand.

In its complaint, Covad pressed its claim for breach of the parties' interconnection agreement and for violation of the prohibitions found in section 222 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) ("1996 Act"), codified at 47 U.S.C. § 222. *See* Covad Petition Appx. at 79a-80a (November 24, 2004). The district court dismissed these two claims under Fed. R. Civ. Proc. 12(b)(1) on the basis that it lacked jurisdiction over any and all disputes that "relate directly to duties under the 1996 Act or to the interconnection agreement, which are to be first reviewed and enforced by the respective [state public service commission]." *Id.* at 80a.

1. Covad argued on appeal to the Eleventh Circuit that the 1996 Act did not divest the district courts of jurisdiction in the matter and that whatever jurisdiction state commissions had was not exclusive. Covad Brief at 51-52 (Dec. 10, 2001). Covad pointed out that Congress anticipated the availability of both judicial remedies and relief before the Federal Communications Commission, both of which the district court had entirely swept aside. *Id.* at 55-58. The crux of Covad's appeal was therefore not that state commissions *lacked jurisdiction*, notwithstanding the Eleventh Circuit's evolving understanding of that issue over time. Instead, Covad argued that nothing in the 1996 Act or other law *divested* the federal courts of jurisdiction to hear the dismissed claims. *Id.* at 51-56.

The Court of Appeals for the Eleventh Circuit reversed the district court's dismissal. It held that Covad's claims for breach of contract and for violation of section 222 were each within the jurisdiction of the district court and therefore properly before it. Covad Petition Appx. at 48a.

BellSouth did not seek review of that portion of the decision to this Court, instead focusing on issues related to the Sherman Act. *See Covad Communications Co., et al. v. BellSouth Corp., et al.*, 299 F.3d 1272 (11th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 1107 (U.S. March 20, 2003) (No. 02-1423). This Court granted BellSouth's petition and vacated and remanded the Eleventh Circuit's decision without comment for reconsideration in light of *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, L.L.P.*, 540 U.S. 398 (2004) ("*Trinko*"). *See BellSouth Corp., et al. v. Covad Communications Co., et al.*, 124 S. Ct. 1143 (2004). *Trinko* did not address the jurisdictional issues raised by Covad in the present Petition.

Contrary to BellSouth's argument, therefore, the effect of the remand "was not to nullify prior proceedings" before the Eleventh Circuit. *United States v. M.C.C. of Florida, Inc.*, 967 F.2d 1559, 1562 (11th Cir. 1992) (citing *Jones v. American Broadcasting Co.*, 961 F.2d 1546 (11th Cir. 1992)). Instead, the Eleventh Circuit was required to reconsider its initial decision in light of this Court's decision in *Trinko*. Covad was therefore under no obligation to seek to restore or reinstate its claims on remand. *Contra BellSouth Opp.* at 1-2. The case remained before the Eleventh Circuit as previously briefed by the parties and in the same posture as on initial appeal, where Covad had pressed the argument against jurisdiction-stripping by the district court.

2. Shortly after this Court's remand, BellSouth filed a Motion For Summary Affirmance before the Eleventh Circuit. With respect to the issues presently under consideration, BellSouth argued that the Eleventh Circuit's intervening *en banc* holding in *BellSouth Telecomm., Inc. v. MCIMetro Access Transmission Servs. Inc.*, 317 F.3d 1270, 1277 (11th Cir. 2003) ("*MCI Metro II*") required reversal of its earlier holding with respect to Covad's breach of contract and section 222 claims. BellSouth Mot. For Summary

Affirmance at 2, 11 (Feb. 2, 2004). Covad did not waive either of these claims in response to the motion.

First, Covad argued that the case should "be reversed and remanded to the lower court, as before, in light of [*MCI Metro II*] and the Supreme Court's opinion in *Trinko* . . . ." Covad Opp. and Motion at 3 (March 1, 2004). Covad continued to seek reversal of the district court's decision *in toto*, including its dismissal of the breach of contract and 1996 Act claims, as it had sought in its briefs and as the Eleventh Circuit had previously granted. Upon attack by BellSouth, Covad defended the Eleventh Circuit's prior holding with respect to its breach of contract and section 222 claims in a section of its brief entitled "Covad's State Law, Breach of Contract, and 1996 Act Claims Are Not Affected By *Trinko*." Covad Reply at 7 (March 22, 2004).

Second, Covad argued that *MCI Metro II* did not hold that federal courts lacked jurisdiction to hear the claims brought in this case. *Id.* at 8. To the contrary, Covad pointed out that *MCI Metro II* did not require the Eleventh Circuit to hold that state commissions have *exclusive* jurisdiction to hear the claims, and argued that there was no basis for stripping the district courts *entirely* of jurisdiction to hear claims for breach of contract and violation of the 1996 Act as alleged. *Id.* at 9.

Covad therefore did not waive any claim of error or cause of action before the Eleventh Circuit. BellSouth's wishful thinking to the contrary, the issues were appropriately raised and preserved. The Eleventh Circuit's decision to divest the district courts of jurisdiction to hear Covad's claims creates a conflict among the circuits and is in error.

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Limiting the district courts to a purely "quasi-appellate" role strips the only meaningful remedies remaining to enforce the local competition provisions of the 1996 Act and

leaves the Eleventh Circuit at odds with other circuits. BellSouth fails to show otherwise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:
TONY G. POWERS
KIMBERLY L. MYERS
ROGERS & HARDIN LLP
2700 International Tower
229 Peachtree Street, NE
Atlanta, GA 30303
(404) 522-4700

JAMES A. KIRKLAND
MARGARET A. ROBBINS
COVAD COMMUNICATIONS COMPANY
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Santa Jose, CA 95134
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FERNANDO R. LAGUARDA
ROBERT G. KIDWELL
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